No. 16494

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal From the United States District Court
Southern District of California
Southern Division

APPELLEES' PETITION FOR REHEARING

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SUBJECT INDEX

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

A decision in this case was rendered on May 21, 1960, by the United States Court of Appeals for the Ninth Circuit wherein the judgment entered in the United States District Court was reversed and the cause was remanded for further proceedings. Pursuant to Rule 23 of the United States Court of Appeals, appellees herewith petition for a rehearing on the two grounds hereinafter set forth.

Appellees refer to and adopt the statement contained in the Appelleees' Brief regarding the facts and matters affecting jurisdiction.

STATEMENT OF THE CASE

Appellees adopt the statement of the case presented in Appellant's Opening Brief saving therefrom and excepting to the fact that appellant "was afforded no opportunity to contest to the granting of the motion . . ." (Appellant's Brief, page 3.)

ARGUMENT

A. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MISSTATED THE CASE, AND SUCH MISSTATEMENT IS MATERIAL TO THE ULTIMATE DECISION.

On page 3 of the opinion of the United States Court of Appeals it is stated:

> "Following several pre-trial conferences, of which the appellant was given notice but at which his incarceration prevented his appearance, the parents of the deceased insured and the administrator filed motions for summary judgment in their favor under the provisions of Rule 56 of the Federal Rules of Civil Procedure. The appellant was notified of the time and place of the hearing of such motions, but of course was unable to be present. " (Emphasis added)

Reference is made to Appellee's Brief, and specifically the statement of the case set forth on page 2. The appellees thereby adopted the statement of the case presented in the Appellant's Opening Brief but excepted to the fact that appellant "was afforded no opportunity to contest the granting of the motion . . ." (Appellant's Brief, page 3; Appellees' Brief, page 2.)

Reference is also made to the first argument in Appellees' Brief wherein it is stated:

> "At no time was appellant deprived of the

> right to retain counsel of his own choosing in this matter. The fact that he was confined in a prison of the state of California did not preclude him from appearing and offering testimony or evidence in this matter. California Code of Civil Procedure, Section 1995; California Penal Code, Section 2623. The entire file of this case in the District Court (now the transcript on the appeal) is replete with affidavits and motions which were, in fact, filed by the appellant." (Appellees' Brief, page 3.)

In reading the opinion of the United States Court of Appeals in this case it appears that the majority opinion relied on the misconception that the appellant was prevented from appearing at the trial of this case due to his incarceration. However, the findings of fact of the District Court quoted in the opinion do not support the conclusion therein stated to the effect that the District Judge concluded that the appellant was not able to participate in the trial proceedings. It is respectfully requested that a rehearing be had in this matter to clarify this particular point in that it appears that the decision of the United States Court of Appeals may in fact be based on a misconception of the California law and of the facts in this particular case.

B. THE OPINION OF THE UNITED STATES COURT OF APPEALS MISCONSTRUES THE CASE OF ABBEY VS LORD, 168 CAL.APP. 2d 499, 336 PACIFIC 2d 226 (1959), AND SUCH MISCONSTRUCTION IS MATERIAL TO THE DECISION.

The case of Abbey vs. Lord, 168 Cal. App. 2d 499, 336 Pacific 2d 226 (1959), was cited by appellees for the proposition that the provisions of the California Probate Code concerning succession proclaimed the public policy of the state of California. At page 505 the California District Court of Appeal states:

> "Probate Code Section 258, was amended in 1955, and disinherison (sic) was extended to one convicted of voluntary manslaughter. This amendment clearly establishes that the legislature does not favor the policy of giving property benefits to murderers or persons convicted of voluntary manslaughter."

The quote taken by the majority opinion from page 504 of the case of Abbey vs. Lord, and particularly the first sentence thereof, clearly states the basis of the decision:

> "The decisive fact in the case at bar is the voluntary, unlawful, felonious killing of one joint tenant by the other as distinguished from an unintentional killing."

One should not be misled by the fact that in the Abbey case, supra, the facts concerning the killing are recited. It appears that the facts recited in the majority

opinion and in the Abbey case, supra, were not taken in the civil case but on the defendant's plea of guilty in the criminal case. In the civil case, the conviction was received by way of stipulation. It is from this fact that the Appellees' Brief stated that the opinion in the Abbey case, supra, indicated that the case was decided upon the mere record of the conviction rather than evidence taken in the civil action.

CONCLUSION

Appellees respectfully submit that a rehearing of this matter should be granted in order to resolve what appears to be a misstatement and a misconception of the Appellees'' appeal, as reflected by the majority opinion of the United States District Court of Appeals.

DATED: June 17, 1960

San Diego, California

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